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No. 955

In the Supreme Court of the United States

OCTOBER TERM, 1944

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

YOUNGERMAN-REYNOLDS HARDWOOD COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered in the above case on November 10, 1944.

OPINIONS BELOW

The findings of fact, conclusions of law and opinion of the District Court (R. 94–97) are reported at 6 Wage Hour Rept. 1117. The opinion of the Circuit Court of Appeals (R. 125–127) is reported at 145 F. (2d) 349.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 10, 1944 (R. 127). A petition for rehearing was denied December 26, 1944 (R. 136). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an employer who is in fact paying his employees piece rates yielding earnings of about 59 cents an hour[1] is excused from paying additional compensation for overtime calculated upon these earnings, by a contract which recites that 35 cents an hour is the "regular rate of pay" and "guarantees" earnings at the piece rates for "regular time and such overtime as the employee may work."

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., sec. 201) are as follows:

> SEC. 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> * * * * * *

[1] The average hourly piece work earnings which are referred to in this petition have been calculated from the actual earnings of respondent's employees, which are shown in Plaintiff's Exhibit No. 1 (R. 115–121).

"(3) For a workweek longer than forty hours after the expiration of the second year from * * * [the effective] date [of this section],"

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

Respondent, a Tennessee corporation, is engaged at Samson, Alabama, in manufacturing lumber for shipment in interstate commerce (R. 94, fdgs. 1–2). In the production of the lumber it employs a number of "stackers" who are engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act (R. 11–13).

Before the Act became effective and during most of the period thereafter, respondent employed and paid its stackers at agreed piece rates per thousand board feet. Each week it paid the same piece rates during overtime hours as during non-overtime hours of work, without provision for overtime at one and one-half times the regular rate of pay as required by Section 7 of the Act (R. 95–96, fdgs. 6–7, 9).

During 1942 more than one-third of the man-weeks worked involved overtime (R. 95, fdg. 7). In the fall of that year an inspector from the Wage and Hour Division notified respondent that

its method of employing the stackers violated the overtime requirements of Section 7 (*ibid.*). Respondent, however, did not alter its method of payment but, even after this action was commenced,[2] continued to employ the stackers during overtime hours when there was work to be done, without compensating them at one and one-half times their regular rate of pay. Between April 1, 1943, and the date of the trial, the stackers worked a total of 134 man-weeks. During 34 of those weeks they worked overtime (R. 119–121; cf. R. 96, fdg. 9), again without added compensation for overtime.

On the day before the trial respondent entered into elaborate contracts with its stackers, signed with a mark by each of the illiterate employees (R. 108–109), which provided that—

> The basic or regular rate of pay is 35¢ per hour for the first forty hours each week and for time over forty hours each week the pay shall not be less than one and one-half times such basic or regular rate above mentioned with a guaranty that the employee shall receive weekly for regular time and for such overtime as the employee may work a sum arrived at as follows:
>
> The amount of stacking done by said employee shall be figured on the basis of 80¢ per thousand board feet of lumber for flat stacking and 70¢ per thousand board feet of lumber ricked.

[2] The complaint in this action was filed on March 17, 1943 (R. 1).

When these agreements were signed, the explanation given to the stackers was that they would continue to be paid piece rates per thousand board feet just as before, but at the higher rates specified in the contracts. There was no evidence that the stackers understood that the agreement was intended to fix the hourly rate for the purposes of the Fair Labor Standards Act at 35 cents an hour rather than at the average hourly earnings of about 59 cents yielded by the new piece work rates. (R. 63–65.)

From April 1, 1943 until the trial the stackers were paid piece rates of 60 and 70 cents per thousand. During this period they earned at those rates an average of 51 cents an hour (see n. 1, *supra*). At the new rates of 70 and 80 cents per thousand the stackers would earn an average of about 59 cents an hour for all hours, well above the 52½-cent overtime rate which would come into operation during weekly overtime hours if the "regular rate" of 35 cents were to be given effect. Hence the new contract, if effective, would enable respondent to pay the specified piece rates uniformly during all hours worked, without higher rates for overtime employment.

The District Court ordered that the complaint be dismissed and the defendant be freed of costs (R. 97). On appeal, the Circuit Court of Appeals affirmed the judgment, holding (R. 127)—

> On the day before the trial a new contract had been entered into between the defendant and the stackers which provided for time and overtime, with a guarantee of additional pay based on the amount of lumber stacked, and the defendant had no intention of returning to the method of payment in dispute. We, therefore, agree with the trial court, that there was no necessity for an injunction to prohibit future violations.

Because the decision of the Circuit Court of Appeals was handed down on November 10, 1944, only four days after the decision of this Court in *Walling* v. *Helmerich & Payne, Inc.*, No. 27, this Term, the Administrator filed a petition for rehearing in which he renewed his argument that payment under the contracts signed the day before the trial would not comply with the Act and pointed out that his contention was squarely supported by the *Helmerich & Payne* decision. On December 26, 1944, the Circuit Court of Appeals denied the petition for rehearing without opinion (R. 136).

REASONS FOR GRANTING THE WRIT

By holding that respondent's employment contracts, executed the day before trial, controlled the overtime compensation of the employees involved, the Circuit Court of Appeals permitted a clear evasion of the Act to stand and failed to give effect to the controlling decision of this

Court in *Walling* v. *Helmerich & Payne Inc.*, No. 27, this Term, decided November 6, 1944. This refusal to apply the overtime provisions of the Act to piece workers raises a serious administrative problem; for this case, coupled with *Walling* v. *Harnischfeger Corporation* (C. C. A. 7), in which certiorari is being sought by the Government in a petition filed at the same time as this petition, reflects continued uncertainty in the Federal courts over the proper application of the decisions of this Court in *Walling* v. *Belo Corp.*, 316 U. S. 624; *Overnight Motor Co.* v. *Missel*, 316 U. S. 572; and *Walling* v. *Helmerich & Payne, Inc.*, *supra*. See the Petition for a Writ of Certiorari in the *Harnischfeger case*, pp. 10–17.

The purpose and effect of respondent's contracts were to circumvent the overtime requirements of the Act. Until the day before trial respondent had been employing the stackers at piece rates of 60 and 70 cents per thousand board feet for more than 40 hours a week. This was a plain violation of Section 7. *United States* v. *Rosenwasser*, No. 106, this Term. It was immaterial that these rates yielded 51 cents an hour, or enough each week to cover the 35-cent minimum wage rate then applicable plus one and one-half times the minimum for overtime. "The Act was designed to require payment for overtime at time and a half the regular pay, where that pay is above the minimum, as well

as where the regular pay is at the minimum" (*Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 578). Respondent was required by the Act to convert the piece rate earnings by computation to hourly rates and to pay at least one and one-half times those rates for overtime employment. *United States* v. *Rosenwasser, supra.*

The contracts executed the day before trial did not alter the character of the arrangement, but were intended to preserve it. Respondent "guaranteed" that it would pay the specified piece rates, yielding about 59 cents an hour, uniformly for all hours of work and provided that these payments should be deemed to include compensation for overtime at not less than one and one-half times the rate of 35 cents an hour, which was labelled the "regular rate of pay." Obviously the 35-cent rate was not the stackers' normal, non-overtime compensation, which would be determined by the piece rates actually paid, but was simply an artificial, fictitious rate approximately 40 per cent lower than the actual normal rate for the non-overtime hours. This so-called "regular rate" was not used for any other purpose than to avoid the payment of actual overtime compensation.

In *Walling* v. *Helmerich & Payne, Inc., supra,* this Court held that the term "regular rate" does not refer to any artificial rate that may be designated, but must be based "upon the wages actually received" during "the hours actually and regu-

larly spent each week in working" (slip opinion, p. 4). The opinion of the Court states (slip opinion, p. 3):

> While the words "regular rate" are not defined in the Act, they obviously mean the hourly rate actually paid for the normal, non-overtime workweek.

This principle was reaffirmed in *United States* v. *Rosenwasser, supra* (slip opinion, p. 3). In the instant case the "rate actually paid for the normal, non-overtime workweek" under the new contracts must be determined, under the formula approved in the *Rosenwasser* case, by dividing each stacker's piece-rate earnings in a given week by the number of hours worked. This was not done and was not proposed to be done. No extra compensation whatever for overtime was paid or proposed to be paid. The arrangement in the new contracts, like that previously prevailing, was in plain violation of Section 7 as construed in the *Helmerich & Payne* and *Rosenwasser* decisions.

The Circuit Court of Appeals sustained the new arrangement as one "which provided for time and overtime, with a guarantee of additional pay based on the amount of lumber stacked" (R. 127). Hence it regarded the contract rate of 35 cents an hour as the "regular rate" for overtime purposes. The invalidity of attaching weight to such a contract provision appears from the opinion in *Walling* v. *Helmerich & Payne, Inc., supra* (slip opinion, pp. 4–5):

> It is no answer that the artificial regular rate was a product of contract or that it was in excess of the statutory minimum. The Act clearly contemplates the setting of the regular rate in a bona fide manner through wage negotiations between employer and employee, provided that the statutory minimum is respected. But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes. Even when wages exceed the minimum prescribed by Congress, the parties to the contract must respect the statutory policy of requiring the employer to pay one and one-half times the regular hourly rate for all hours actually worked in excess of 40. Any other conclusion in this case would exalt ingenuity over reality and would open the door to insidious disregard of the rights protected by the Act.

The Fair Labor Standards Act, of course, as this Court held in *Walling* v. *Belo Corp.*, 316 U. S. 624, does not deprive employers and employees of the right to fix by contract the rates of compensation which the employees shall actually receive for their normal, non-overtime hours; but "this freedom of contract does not include the right to compute the regular rate" for the purposes of Section 7 "in a wholly unrealistic and artificial manner so as to negate the statutory purposes" (*Walling* v. *Helmerich*

& Payne, Inc., slip opinion, p. 4). It is in the latter manner that the rate of 35 cents an hour was fixed in the instant case. The rate which the employer and employees were free to fix by contract was the actual rate of compensation. They fixed such rates at 70 and 80 cents per thousand board feet of lumber stacked. Once these rates had been fixed, the respondent was bound to pay for overtime employment at not less than one and one-half times these rates after their translation to an hourly basis. No contract can be permitted to set this obligation aside.

The decision of the Circuit Court of Appeals, unless reversed will permit employers of piece rate workers, by contract, to set at naught the overtime requirements of the Act, through the use of fictitious "regular rates" of pay. Equally with the arrangement which was declared illegal in *Walling* v. *Helmerich & Payne, supra,* and in a substantially similar manner except that piece workers are involved, such a device entirely frustrates the purpose of Section 7. The provision of respondent's contracts that the statutory minimum shall be the "regular rate" and that not less than one and one-half times this rate will be paid for overtime permits payment of the same piece-rate compensation during overtime hours as during the regular workweek. Thus the employer avoids the financial pressure to spread employment and the employee fails to receive the added compensation for overtime which Sec-

tion 7 was designed to achieve. See *Walling* v. *Helmerich & Payne,* slip opinion, p. 3.

The judgment in this case cannot be regarded as an isolated decision which the course of subsequent decisions will correct. In *Walling* v. *Harnischfeger Corporation,* the Circuit Court of Appeals for the Seventh Circuit rendered a similar decision sustaining a collective agreement which, for purposes of Section 7, fixed a "regular rate" of pay of pieceworkers approximately 20 per cent lower than the employees' actual rate of compensation under a so-called incentive plan. As has been stated (*supra,* p. 7), a petition for certiorari to review that decision, which explores the problem involved somewhat more fully, is being filed concurrently with this petition.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

DOUGLAS B. MACGS,
Solicitor of Labor.

FEBRUARY 1945.

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